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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 165.

JAMES A. AKERS and LELA AKERS, his wife, *Petitioners,*

v.

FRANK SCOFIELD, individually and as Collector of Internal Revenue for the First District of Texas, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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July 19, 1948.

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

James A. Akers, and Lela Akers, his wife, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled case April 23, 1948 (R. 40). The Circuit Court of Appeals affirmed a decision of the District Court of the United States (R. 23) denying refunds of income taxes for the years 1932, 1933 and 1936.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered April 23, 1948. Jurisdiction to issue the writ requested is found in Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Mrs. Dora Roberts "made a deal with James A. Akers, whereby she agreed to, and did, advance large sums of money to him for the purpose of acquiring some maps which Akers represented were in existence in Mexico and which would reveal the location, on her ranch, of much buried gold." (R. 40)

"In due course he (Akers) produced a map, and by its pretended use directed the treasure seekers to a designated spot on the Roberts ranch whereat a quantity of metal bars, resembling gold, was dup up. Akers had made, or caused to be made, the map out of his imagination and the 'gold' bars out of brass." (R. 41)

1. Was the money so received by Akers "income" and taxable as such? Or, was it not income and not taxable within the rule of *Commissioner* v. *Wilcox*, 327 U. S. 404, which held that embezzled funds are not income of the embezzler?

SUMMARY STATEMENT OF MATTER INVOLVED.

The facts were stipulated in the District Court. The stipulation appears in full in the record at page 14. The facts may be summarized as follows:

Dora Roberts is a wealthy widow who resides near Big Spring, Texas. In 1932, James A. Akers, the petitioner herein, represented to Mrs. Roberts that he had connections in Mexico with people who were in possession of maps which showed the location of buried treasure on her ranch. Mrs. Roberts agreed to supply all funds necessary to purchase such maps. It was further agreed that Mrs. Roberts and Akers would share equally in the proceeds of all treasure found on her ranch as a result of the maps to be obtained. As a consequence of this agreement, Mrs. Roberts advanced money in varying sums and at various times to Akers to enable Akers to purchase the said maps. Akers, however, did not use the money for the purpose for

which it was received because there actually was no treasure buried on the ranch and there were no maps showing the existence of such treasure. Akers did cause maps to be made and delivered to Mrs. Akers. They showed the location on the ranch where brass bars had been planted by Akers.

The Treasury Department ruled that the money advanced by Mrs. Roberts for the purpose of securing the maps was income of Akers. Suit was brought in the District Court on the ground that under the decision of this Court in *Commissioner* v. *Wilcox*, 327 U. S. 404, the money was not received under a claim of right so was not income.

The District Court was of the opinion that when funds are embezzled as in the *Wilcox* case no title passes, but when funds are obtained under the circumstances of this case, title does pass. Consequently, the Court concluded the money received by Akers was income and taxable. (R. 23, 33)

The Circuit Court of Appeals approved the conclusion of the District Court and added the further reason that equity prevented recovery of the tax paid.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision below is in conflict with *Commissioner* v. *Wilcox*, 327 U. S. 404, 34 A. F. T. R. 811. In that case this Court decided that embezzled funds were not income. In deciding the *Wilcox* case this Court stated:

> "• • • a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditioned obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received

any gain or profit within the reach of Section 22(a).[1] * * * Nor can taxable income accrue from the mere receipt of property or money which one is obliged to return or repay to the rightful owner, as in the case of a loan or credit. * * * the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Section 22(a).

"We fail to perceive any reason for applying different principles to a situation where one embezzles or steals money from another. Moral turpitude is not a touchstone of taxability. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of Section 22(a)."

We submit that no better language could be written to describe the exact situation presented by the case at Bar. The decision below is clearly in direct conflict with *Commissioner* v. *Wilcox.*

It is absurd to say that Akers ever had title to the money received from Mrs. Roberts. Any Court in the land would have held he had no title and ordered the return of the money to its rightful owner. Yet, the District Court held (R. 34) and the Circuit Court affirmed, that:

"The distinction between theft and embezzlement on the one hand and swindling on the other, is that in the former case title to the property acquired never passes, while in the latter case, title does pass."

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[1] Section 22(a) of the Internal Revenue Code reads:

"Sec. 22. Gross Income.

(a) General Definition.—'Gross Income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

The Courts below failed to recognize that the determination of whether title passed to Akers is dependent upon the intention of the defrauded party (Mrs. Roberts) and not upon the intention of the defrauder (Akers).

In 35 C. J. S. 639, it is stated:

> "• • • The distinction between the crimes of obtaining by false pretenses and larceny lies in the intention with which the owner parts with the property; if the owner, in parting with the property, intends to invest accused with the title as well as the possession, the latter has committed the crime of obtaining the property by false pretenses, but if the intention of the owner is to invest accused with the mere possession of the property, and the latter, with the requisite intent, receives it and converts it to his own use, the crime is larceny."

Mrs. Roberts never intended to give Akers title to any of the money which she put in his possession. To induce her to part with the money, he represented to her that he knew where maps could be purchased. She agreed to advance money to purchase the maps. Akers, using her money, was to acquire these maps from third persons. In this respect, he never acted as a principal but only as Mrs. Roberts' agent.

The fact that all of Akers' representations were fraudulent, that he knew that there were no maps to be obtained and intended at all times to convert the money to his own purpose cannot serve to divest Mrs. Roberts of title to the money. The intent of the offender does not control.

This case is in no way similar to cases involving persons engaged in illegal enterprises because in those cases the recipient receives the money under a claim of right and it cannot be recovered. Illustrations are income from bootlegging,[2] race track bookmaking,[3] gambling,[4] payments

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[2] *U. S.* v. *Sullivan*, 274 U. S. 259, 6 A. F. T. R. 6753.

[3] *James P. McKenna*, 1 B. T. A. 326.

[4] *L. Weiner*, 10 B. T. A. 905.

to union officials to prevent obstruction of prompt loading of cargoes on vessels,[5] and many similar situations.

II.

The lower Court, in addition to denying the applicability of the *Wilcox* case said the petitioner could not recover because (R. 44):

> "Appellants are the movers in this case, and, as such, must carry the burden of showing their right to equitable relief, *ex aequo et bono*. It seems clear in this case that they have not a case in which, under equitable standards, they are entitled to succeed."

Stated another way, the Circuit Court held that if the government collects money under the guise that it is a tax on income the payer cannot recover even though there was in fact no income, because the manner of the receipt of the money was reprehensible.

To permit the government to retain money collected as tax, when no income was realized and no tax due, would, in effect, put the government in as unsavory a position as the petitioner. "* * * the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Section 22(a)".[6]

If there was in fact no income, "equity" cannot possibly make the receipt of money income.

The "equity" cases relied upon by the Court below all deal with situations involving valid taxes. Such cases in no way control the case at bar, where no valid tax is involved. In addition, they all deal with situations where there is equity between the parties to the action. By that is meant that a taxpayer, or someone in privity with him, has misled the Government to the detriment of the Government.

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[5] Richard Law, 2 T. C. 623.

[6] *Commissioner* v. *Wilcox*, 327 U. S. 404.

For instance, *Stone* v. *White*, 301 U. S. 532, 19 A. F. T. R. 503, cited by the Court below, held that trustees who had paid a tax on the income of a trust estate which should have been paid by the beneficiary were not entitled to recover the tax where the Government's claim against the beneficiary was barred by limitation.

The decision of the Court below on "equity" is in conflict with all established law of taxation. If permitted to stand it can lead only to confusion and litigation.

III.

The case presents an important question of Federal law which should be settled by this Court. The Treasury Department is presently engaged in a "drive" on tax evaders. In an astonishingly large number of cases it is claimed that, because of the *Wilcox* decision, the money sought to be taxed is not income.[7] The Treasury attempts to limit the application of the *Wilcox* rule. If the rule is subject to limitation the Court should define the limitations and reduce litigation on this question.

Respectfully submitted,

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July 19, 1948.

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[7] The Prentice-Hall Federal Tax Citator shows that the *Wilcox* case has been cited more than 25 times. This is true even though the case was decided February 25, 1946.